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JUL 22 2014

King County Prosecutor  
Appellate Unit

COA NO. 70859-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES TUCKER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant received ineffective assistance of counsel.

Issue Pertaining to Assignment of Error

Whether counsel was ineffective in failing to object to testimony that appellant had assaulted the complaining witness before, where there was no legitimate reason not to object and there is a reasonable probability the failure affected the outcome?

B. STATEMENT OF THE CASE

The State charged James Tucker with one count of third degree assault committed against Frances Tucker.<sup>1</sup> CP 1. Tucker and Frances were divorced. 3RP<sup>2</sup> 30-31. Both used drugs during their marriage.<sup>3</sup> 3RP 42. The two still saw one another, and Tucker often stayed the night at Frances' apartment. 3RP 31-33, 65-66.

Frances gave her version of events at trial. According to Frances, Tucker called and said he was coming over to her apartment. 3RP 33-34. He arrived at about 1:30 in the morning on December 5, 2012. 3RP 34-36. Frances thought Tucker was under the influence of cocaine, having given him money to buy the drug a few days earlier. 3RP 41, 68. The two

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<sup>1</sup> For clarity, this brief refers to Frances Tucker as "Frances."

<sup>2</sup> The verbatim report of proceedings is referenced as follows: 1RP 6/17/13 (jury selection); 2RP – 6/17/13 (pre-trial motions); 3RP -6/18/13; 4RP – 6/19/13; 5RP – 6/20/13; 6RP – 8/30/13.

<sup>3</sup> Frances described herself as a former addict. 3RP 68.

argued over their past history. 3RP 43-45. After Tucker took a shower, he talked to her about how she was not supporting him. 3RP 45. Tucker became angry because Frances did not want to talk until morning. 3RP 46.

It eventually reached the point where Tucker walked toward her and "made a motion like he was going to . . . do something to me." 3RP 47. Three times Frances said "so now you want to hit me." 3RP 47. Tucker then hit her several times with his right hand or arm, which had a cast up to the elbow but left his fingers uncovered. 3RP 47-48, 53, 69, 72, 75-76.

Frances fell onto the bed. 3RP 49. Tucker then choked her, squeezing her neck until she could not breathe. 3RP 49. Tucker's cast was against her neck. 3RP 75. She fought back, grabbed at his hand and scratched him. 4RP 49, 69-70, 78. Frances managed to break free. 3RP 49. They ended up on the floor and Tucker again choked her "with the same position." 3RP 49-50. He ended up letting her go. 3RP 50. He kicked her in the chest while she was on the floor. 3RP 50-51. The fight ended with Tucker telling her to put an ice pack over her eye. 3RP 51. He told her to wear sunglasses to cover up the injury. 3RP 52. After Tucker fell asleep, Frances called the police. 3RP 53.

Police arrived and arrested Tucker. 4RP 93. He did not appear intoxicated. 4RP 96. The arresting officer who handcuffed Tucker did not see any scratches, bruises or marks on Tucker's hands. 4RP 96-97.

Frances told a responding Fire Department medic that she had been hit seven times with an arm covered in a cast, and that she had been choked and kicked in the ribs two hours prior to calling 911. 4RP 71, 101. According to testimony and photographs admitted into evidence, her injuries included a swollen eye and a cut, swollen lip. 3RP 48, 51, 59-64; 4RP 77, 90-91.

Dr. Allan, an orthopedist with a specialty in hand surgery, testified for the defense. 4RP 8-9. Before the charging period at issue, Dr. Allan examined Tucker and determined he had dislocated his right, carpal metacarpal thumb joint. 4RP 10-11, 36. The doctor performed surgery on Tucker's hand on November 8, stabilizing the joint with wire pins drilled into bone. 4RP 11-12, 18-19, 32, 47. After two weeks, a splint was changed out for a fiberglass cast. 4RP 21, 23. The purpose of the cast was to stop the joint from being dislocated. 4RP 24. It immobilized the thumb. 4RP 24. The thumb was unable to be folded into the palm, but the fingers could still be closed. 4RP 26, 38. The thumb joint farthest away from the wrist had a 40 degree range of motion. 4RP 25, 37. The other fingers remained mobile. 4RP 37-38.

When cured, the cast is a rough fabric. 4RP 30. The cast was capable of leaving marks or injuries if held against someone's neck, depending on its orientation and the amount of pressure used. 4RP 28-31.

When Dr. Allan saw Tucker for a follow-up appointment on December 26, the pins were still in the same position since surgery. 4RP 20-21, 39. When the doctor saw Tucker again on January 16, 2013, there was still no movement of the pins and no apparent movement of the thumb joint. 4RP 27-28. The cast was still in place. 4RP 28. This suggested there had been no movement of the bones or the pins stabilizing the bones since surgery. 4RP 28. It also suggested the hands and wrist had not been involved in any trauma since surgery, but the doctor did not know that for certain. 4RP 42, 46, 48. The doctor opined with medical certainty that the joint had not be redislocated. 4RP 41.

The defense also called public defender Amy King, who saw Tucker on December 10. 4RP 120-21. She did not see any scratches, bruises or marks on Tucker's hand. 4RP 121-22.

In closing argument, defense counsel contended the State could not prove beyond a reasonable doubt that Tucker was the one who injured Frances. 4RP 149-50, 158. In support of this theory, counsel pointed out that Tucker's thumb was immobilized by the cast, which meant his thumb would have been hurt or the pins moved if he had struck her. 4RP 151-52,

158-59. The doctor suggested Tucker's hand had not been involved in any trauma since surgery. 4RP 158. Frances was bloodied, but there was no blood on Tucker's cast. 4RP 152-53, 160. There were no marks on her neck, even though the cast was rough and was capable of leaving marks on the skin. 4RP 153-54, 161. Frances said she scratched Tucker in an effort to get him off of her, but the arresting officer did not see any marks. 4RP 155.

The jury convicted as charged. CP 58. The court imposed a prison-based Drug Offender Sentencing Alternative, consisting of 27.75 months in confinement followed by 27.75 months of community custody. CP 62. This appeal follows. CP 69.

C. ARGUMENT

COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT TO TESTIMONY SHOWING TUCKER'S PROPENSITY TO COMMIT THE CHARGED CRIME.

Defense counsel was ineffective in failing to object to Frances' testimony that Tucker had assaulted her before. Counsel's deficient performance allowed the jury to consider the evidence for an improper propensity purpose. Reversal is required because there is a reasonable probability the deficiency affected the outcome.

Criminal defendants are guaranteed the right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const., art. I, § 22. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687.

On direct examination, the prosecutor asked Frances why she did not run out the door. 3RP 52. Frances answered "Because I don't want him chasing me down the hall where I lived at. And I know from the past experience, when this happened, I wait until he falls asleep. This is my first time ever coming out speaking about this." 3RP 53. Defense counsel did not object. In context, it is clear that Frances was referring to being previously assaulted by Tucker when she explained "I know from the past experience, *when this happened*, I wait until he falls asleep."

On cross examination, counsel asked Florence: "You have never, you said in speaking with Mr. Sanchez, this was the first time you ever talked about any incident between you and Mr. Tucker, is that correct?" 3RP 73-74. Frances answered "I tried to do it once before. But I allowed him to sweet talk me into not pressing charges on him once before. This is the first time I am ever doing this, yes." 3RP 74. Defense counsel did not

object and move to strike the first two sentences of Frances's answer, which were non-responsive to the question but which unmistakably referred to being assaulted before. Nor did defense counsel move in limine to prevent such testimony before Frances took the stand.

The failure to object to evidence constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). As set forth below, Tucker establishes those three requirements:

- a. There Was No Legitimate Tactical Reason For Failing To Object To Evidence Showing Tucker's Propensity To Commit The Crime Charged.

Deficient performance is that which falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. "Not all strategies or tactics on the part of defense counsel are immune from attack." State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011). "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000). Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that defense

counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The record in this case rebuts the presumption of reasonable performance. No legitimate tactic justified the failure to object to damaging evidence that showed Tucker had a propensity to commit the crime charged. "The law has long recognized that evidence of prior crimes is inherently prejudicial to a defendant in a criminal case." State v. King, 75 Wn. App. 899, 905, 878 P.2d 466 (1994). Evidence of other misconduct is prejudicial because jurors may convict on the basis that the defendant deserves to be punished for a series of immoral actions. State v. Bowen, 48 Wn. App. 187, 195, 738 P.2d 316 (1987).

Such evidence "inevitably shifts the jury's attention to the defendant's general propensity for criminality, the forbidden inference; thus, the normal 'presumption of innocence' is stripped away." Bowen, 48 Wn. App. at 195. "This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence." State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

Given that prior bad act evidence is prejudicial, there must be a good reason to make use of it at trial. Defense counsel, however, did not attempt to use evidence that Tucker previously assaulted Frances in service of a defense theory. No mention of it was made in closing argument. 4RP 146-62. Nor is there a discernable reason why Tucker's counsel would not move to strike the non-responsive portion of the answer during cross examination that indirectly but unmistakably referred to prior assaultive behavior.

The State might argue defense counsel chose not to object because an objection would have emphasized the evidence to Tucker's detriment. That argument fails because a sustained objection and instruction to disregard the testimony would have prevented jurors from using the prior assault evidence to improperly infer that Tucker assaulted Frances because he had done it before. "Jurors are presumed to follow instructions." State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982), cert. denied, 459 U.S. 1211, 103 S. Ct. 1205, 75 L. Ed. 2d 446 (1983). A contrary view is untenable. Grisby, 97 Wn.2d at 509.

Further, the evidence was not of a type that jurors were likely to forget. Evidence of other bad acts *inevitably* shifts the jury's attention to the defendant's general propensity for criminality. Bowen, 48 Wn. App. at 195. To jurors, propensity evidence is logically relevant. State v. Holmes,

43 Wn. App. 397, 400, 717 P.2d 766 (1986). There was no legitimate reason not to object to inherently prejudicial evidence towards which the jury's attention was inevitably drawn.

Even if there was a legitimate reason not to object in front of the jury, competent counsel would have moved in limine to avoid the problem altogether. A motion in limine's purpose is to dispose of legal matters outside the presence of the jury and thereby avoid the requirement that counsel object to evidence in front of the jury. State v. Sullivan, 69 Wn. App. 167, 170, 847 P.2d 953 (1993); State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). A motion in limine seeking exclusion of ER 404(b) would likely have been successful. See section C.1.b., infra. There would have been no risk of emphasizing damaging evidence in front of the jury and Frances would have been instructed not to mention any prior assaults in her testimony. See State v. Montgomery, 163 Wn.2d 577, 592, 183 P.3d 267 (2008) (prosecutors have a duty to prepare witnesses for trial, including explaining to them any orders in limine entered by the court).

The failure to object undermined the defense theory of the case that Tucker did not commit the criminal act for which he stood trial. Tucker received no benefit from having the jury consider the prejudicial evidence as it deliberated on whether the State had proved its case beyond

a reasonable doubt. He was only hurt by it. Tucker has established deficient performance.

b. The Trial Court Would Likely Have Sustained Objection To The Propensity Evidence.

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." State v. Gresham, 173 Wn.2d 405, 420, 269 P.3d 207 (2012).

Evidence of prior misconduct "*may*, however, be admissible for any other purpose, depending on its relevance and the balancing of its probative value and danger of unfair prejudice." Gresham, 173 Wn.2d at 420. "ER 404(b) is only the starting point for an inquiry into the admissibility of evidence of other crimes; it should not be read in isolation, but in conjunction with other rules of evidence, in particular ER 402 and 403." State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). ER 404(b) incorporates the relevancy and unfair prejudice analysis found in ER 402 and ER 403. Saltarelli, 98 Wn.2d at 361-62.

The evidence must be logically relevant to a material issue before the jury, which means the evidence is "necessary to prove an essential ingredient of the crime charged." Id. at 362. Even relevant evidence is excludable if its probative value is substantially outweighed by the danger of unfair prejudice. Id. at 361-62. In considering whether evidence is admissible under ER 404(b), doubtful cases should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334.

"A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). When determining admissibility under ER 404(b), the trial court must (1) find the alleged misconduct occurred by a preponderance of the evidence; (2) identify the purpose for admission; (3) determine whether the evidence is relevant to prove an element of the crime charged; and (4) weigh the probative value against its prejudicial effect. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

The admissibility of ER 404(b) evidence is reviewed for abuse of discretion. State v. Dawkins, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). Defense counsel must object in order to invoke the trial court's discretion, and the failure to do so can be deficient. See Dawkins, 71 Wn. App. at 910 ("Though defense counsel was correct that 'lustful disposition'

evidence is generally relevant under ER 404(b), he failed to consider the axiomatic, fundamental principle that evidentiary rulings are assigned to the discretion of the trial court. Without raising the objection, counsel was in no position to hypothesize that the court would not have excluded the evidence.").

The State has the burden of establishing relevancy. Gresham, 173 Wn.2d at 421. The State at no time offered any basis for which evidence of past assault would be admissible at Tucker's trial. It was not mentioned in any pre-trial briefing or discussion on pre-trial motions. CP 6-12, 71-77; 2RP 3-25. When Frances testified, there was no indication that the defense sought to make an issue of any minor delay in reporting to police. Frances' credibility was not under attack with respect to the timing of police contact. The evidence was therefore irrelevant to prove a material issue before the jury. Saltarelli, 98 Wn.2d at 362.

Further, even if the evidence was relevant, its prejudicial effect outweighed whatever marginal probative value it might have possessed. Evidence tending to show a defendant has been involved in the same or similar criminal activity in the past is especially prejudicial because it is more likely jurors will conclude the defendant had a propensity for committing that type of crime. State v. Condon, 72 Wn. App. 638, 649, 865 P.2d 521 (1993), review denied, 123 Wn.2d 1031 (1994). Frances

told jurors that "this happened before." 3RP 53. In an assault case, such evidence is extremely prejudicial.

It is therefore likely the trial court would have sustained a defense objection to Frances' testimony on direct examination, or granted a motion in limine to prevent such testimony from being uttered. See State v. Hendrickson, 129 Wn.2d 61, 78-80, 917 P.2d 563 (1992) (failure to object to testimony that defendant had two prior drug convictions constituted deficient performance where there was no legitimate reason not to object and evidence would have been inadmissible because its prejudicial effect outweighed its probative value).

Further, a simple objection and motion to strike Frances' problematic testimony during cross-examination on grounds of non-responsiveness would have been sustained. Counsel asked Frances to confirm that "this was the first time you ever talked about any incident between you and Mr. Tucker, is that correct?" 3RP 73-74. That question called for a yes or no answer. Frances answered: "I tried to do it once before. But I allowed him to sweet talk me into not pressing charges on him once before." That was not a pertinent response to the question. 3RP 74. Objection on the ground of non-responsiveness would have been sustained, while a successful motion in limine would have prevented Frances from testifying about any prior assault.

c. The Improper Propensity Testimony To Which Counsel Did Not Object Undermines Confidence In The Outcome.

Prejudice results from a reasonable probability that the result would have been different but for counsel's performance. Thomas, 109 Wn.2d at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Tucker "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693.

A rational trier of fact could conclude the State failed to prove its case beyond a reasonable doubt. As legitimately argued by defense counsel, evidence allowed for the inference that Tucker's thumb would have been injured if he had attacked Frances. 4RP 151-52, 158-59. Further, there was no blood on Tucker's cast even though Frances suffered blood loss and there were no marks on Frances' neck, even though the cast was rough and was capable of leaving marks on the skin. 4RP 152-54, 161. In addition, Frances said she scratched Tucker in an effort to get him off of her, but the arresting officer did not see any marks. 4RP 155. The inconsistencies in the evidence allowed for reasonable doubt that Tucker was the person who committed the assault. Defense counsel performed competently in pointing out those inconsistencies.

But counsel performed deficiently in sabotaging the defense theory by failing to object to the propensity evidence. See Saunders, 91 Wn. App. at 578-82 (counsel ineffective for eliciting testimony of defendant's prior drug conviction where it was not a legitimate tactic, the evidence was inadmissible and the other evidence against the defendant was not overwhelming); State v. Escalona, 49 Wn. App. 251, 256-57, 742 P.2d 190 (1987) (where charge was assault with deadly weapon, trial court erred in denying motion for mistrial where jury might have used information of defendant's prior offense involving knife to conclude he had acted on this occasion in conformity with the assaultive behavior he demonstrated in the past).

Jurors are naturally inclined to reason that having previously committed a crime, the accused is likely to have reoffended. State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990). The failure to object to evidence of past assault allowed the jury to follow its natural inclination and infer Tucker acted in conformity with his character and therefore likely committed the assault charged by the State. By failing to object, the jury was allowed to indulge in the common assumption that "since he did it once, he did it again." Bacotgarcia, 59 Wn. App. at 822. Because a jury is naturally inclined to treat evidence of other bad acts as evidence of criminal propensity, the admission of this evidence eroded the

presumption of innocence and tainted the jury's deliberation. Bowen, 48 Wn. App. at 195.

The constitutional right to effective assistance "exists, and is needed, in order to protect the fundamental right to a fair trial." Strickland, 466 U.S. at 684. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). Under the circumstances, defense counsel's deficient performance undermines confidence in the outcome of the case. A new trial is required.

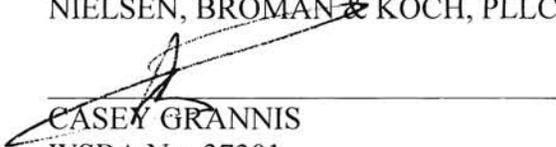
D. CONCLUSION

For the reasons set forth, Tucker requests reversal of the conviction.

DATED this 21<sup>st</sup> day of July 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

  
CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 70859-7-1
	)	
JAMES TUCKER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22<sup>ND</sup> DAY OF JULY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES TUCKER  
DOC NO. 273874  
WASHINGTON STATE PENITENTIARY  
1313 N. 13<sup>TH</sup> AVENUE  
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 22<sup>ND</sup> DAY OF JULY, 2014.

X Patrick Mayovsky

COURT OF APPEALS  
STATE OF WASHINGTON  
2014 JUL 22 AM 4:28